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No. 86-473

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

GWALTNEY OF SMITHFIELD, LTD.,
Petitioner,

v.

CHESAPEAKE BAY FOUNDATION, INC.
and
NATURAL RESOURCES DEFENSE COUNCIL,
Respondents.

BRIEF OF *AMICI CURIAE* MID-ATLANTIC LEGAL FOUNDATION, INC., AND CONSUMER ALERT IN SUPPORT OF PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

By adopting the citizen suit provisions of the federal Clean Water Act, did Congress intend to empower individual citizens to punish operators of economically and socially productive facilities who, by the exercise of good faith and the adoption of state-of-the-art technology, have accomplished compliance with the permit provisions of the Act?

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INTERESTS OF *AMICI*

Pursuant to the Court's Rule 42, Mid-Atlantic Legal Foundation, Inc. and Consumer Alert hereby move the

Court for leave to file the attached brief as *amici curiae*. Consent was secured from counsel for all parties. Copies of the letters of consent have been filed with the Court.

Mid-Atlantic Legal Foundation, Inc., is a non-profit, tax-exempt corporation organized and existing under the laws of Pennsylvania. It is a law firm which seeks to present balanced articulation of the public interest in matters of broad impact such as the instant case.

Consumer Alert is a non-profit corporation organized and existing under the laws of the District of Columbia. It is a nationwide organization composed of over 6,000 members of whom approximately 160 are residents of Virginia. Consumer Alert engages in the study and dissemination of information on problems and issues affecting American consumers. Its principal objective is to ensure fair and fully expositive presentations of matters affecting the public interest.

STATEMENT OF THE CASE

For the sake of brevity *amici* do not separately set forth their statement of the case but adopt that set forth by petitioner in its petition.

Amici do set forth certain key facts and the issues presented by those facts to the courts below and here.

(a) *Key Facts:*

October 27, 1981	Petitioner acquires existing operating facility and shortly thereafter learns of permit exceedences.
October 1982	Interrelated chlorine/fecal coloform problem solved.
October 1983	State-of-the-art waste water treatment facility in place and debugging.

March 1983	Enforcement agency affirmatively approves technology and solutions and affirmativley rejects enforcement action as unnecessary.
May 15, 1984	Last nitrogen exceedence recorded.
June 15, 1984	Citizen suit commenced.

From May 15, 1984 to the present, a period of two and one-half years, no exceedences have occured, save one attributable to an act of God.

(b) *The Issue*

The issue as perceived and defined by conflicting courts below has been whether a continuing violation is necessary to confer subject matter jurisdiction over citizen suits seeking penalties for wholly past violations. The Fifth Circuit has answered yes [*Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392 (5th Cir. 1985)]. The Fourth Circuit in the instant case has answered no.

Amici suggest that the issue should be defined differently: Did Congress intend to confer subject matter jurisdiction over suits by individual citizens which seek penalties for wholly past violations which occurred in a period during which the operator

1. acted in good faith,

2. with reasonable diligence,

3. solved permit problems,

4. employed state-of-the-art technology in the process, and

5. accomplished full effective, long term compliance with his permits.

REASONS FOR GRANTING *CERTIORARI*

A. There is a direct conflict of opinion between circuit courts on whether a citizen suit under the Act[1] will lie in the absence of an ongoing violation. [*Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392 (5th Cir. 1985); *Chesapeake Bay Foundation, Inc.*, v. *Gwaltney of Smithfield*, 791 F.2d. 304 (4th Cir. 1986).

B. The issue is both quantitatively and qualitatively important. The precise issue of citizen imposed penalties on defendants who have achieved compliance with the law has arisen at least 18 times in the last four years. (Petition, at 22, n.15)

They arise out of a nationwide campaign of citizen suits now numbering over 400, with more likely. (*See*, *The National Law Journal*, Dec. 6, 1982, at 3; Petition at 22).

The issue is qualitatively important for at least five reasons. First, the holding of the Fourth Circuit below would appear to be at direct odds with this court's statement in *Middlesex County Sewerage Authority* v. *Sea Clammers Association*, that the act authorizes suits only for prospective relief. [453 U.S. 1, 6 (1981)].[2]

Second, assuming *arguendo* that the issue of post-achievement penalties has not been determined by *Sea Clammers*, the case presents the serious question of whether the district courts and the court of appeals below are effectuating a proper balance among policy goals,

1. The Clean Water Act, 33 U.S.C. § 1251 *et seq.* (1982). The citizen suit provision is found at 33 U.S.C. § 1365 and will sometimes be referred to herein as Section 505 of the Act.

2. *Amici* also question whether the Fourth Circuit, and various district courts on whose decisions it relied in part, have properly understood this Court's definition of "private attorneys general" as citizens enforcing the Act as an alternate to the non-action of government agencies. Here the State of Virginia determined that compliance with the Act had been achieved and that no further enforcement action was necessary or desireable. (See Petition at 4). Respondents sued anyway.

recognized need for time and technological development for the solution of problems, and the rights and duties of plant operators, federal and state enforcement authorities, and individual citizens, all of which are reflected in the carefully drafted statute; or whether conversely, they are creating an imbalance in favor of citizen groups not contemplated by the statute, to the detriment of plant operators obedient to their duties under the Act.

Third, the issue is obviously of importance to all plant operators who have accomplished compliance or who are in the process of doing so.

Fourth, the issue presents the question of whether the imposition of post-achievement penalties would operate as an incentive or disincentive.

The Fourth Circuit assumed that the imposition of post-achievement penalties would operate as an incentive to compliance. *Amici* submit that the assumption is at a minimum questionable.

Certainly if post-achievement penalties are *not* allowed, all operators have the substantial incentive to achieve compliance as promptly as possible because to do so will reduce their penalty liability to zero, and the potential penalties during the solution period will be seen as extra returns on investments in solution equipment.

The decision to invest in any equipment, environmental or otherwise, however, is the function of many variables including as to each investment option, availability and cost of capital and the return on each such option. If penalties can be imposed whether or not compliance is achieved, the potential savings of such penalties during the solution period are removed as returned benefits on investment in solution equipment, discouraging rather than encouraging the selection of that investment option.[3]

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3. Any reductions allowed under EPA Civil Penalty Policy [41 Env. Rep. (BNA) 2991 (1984)] introduce mere potential variables into the return on investment analysis.

Amici submit that the Fourth Circuit and the district courts of like approach have not properly understood or applied the statute's penalty incentive concept and that this Court's review is necessary for the concept's past misapplication to be righted and future misapplications avoided.

Fifth, the United States Government has expressed its view that citizen plaintiffs cannot maintain post-compliance suits for civil penalties only. (See citation of U.S. amicus brief in *Sierra Club* v. *Shell Oil*, at instant petition 20.)

C. *Amici* urge that the interpretive intervention of this Court is imperative as well because the Fourth Circuit and the district courts following similar reasoning, are creating lower court law which feeds on itself, each court citing as precedent all of their cases which have gone before. As an example of this mushrooming, please see the court below at 791 F.2d, 309-310 (Petition Appendix A, at 10a-11a).

On the surface there would appear to be little wrong with that. But that approach rejects this Court's statement in *Sea Clammers* that the Act authorizes citizen suits only for prospective relief, and adopts an expansive reading of the statute favored by those courts. (791 F.2d., at 311).

Moreover, in an apparent attempt to come out with what they view as a "good result,"[4] *i.e.*, support of clean water, those courts have, in the view of *amici*, misread plain english, misapplied basic english grammar and rules of construction and misjudged the basic concepts

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4. No less an authority than Mr. Justice Cardozo has warned us to beware of the "good result" and of judicial zealousness which seeks desirable ends and so justifies improper judicial means. [See, *United Steel Workers of America* v. *Weber*, 443 U.S. 193, 218-219, 61 L.Ed. 2d 480, 498-499, 99 S.Ct. 2721 (1979) (Justice Burger dissenting)].

of jurisdiction and penalty. Amici note that this "good result" has or will severely injure operators who have complied with the Act and regulations thereunder without environmental benefit incremental to that the operator has achieved by compliance.

1. As petitioner has pointed out, the first paragraph of Section 505 confers subject matter jurisdiction of a citizen suit where a plant operator "is in violation" of a standard or an order. The plain meaning of those words mandates that subject matter jurisdiction will not attach unless the defendant is in violation of the time of suit. That is the reasoning of the Fifth Circuit.[5] (*See, Hamker*, 756 F.2d, at 395).

In addition, however, *amici* would point out that the language of the second paragraph of Section 505 is consistent and supportive of petitioner's and the Fifth Circuit's reading of the first paragraph.

There, district courts are granted remedial jurisdiction to enforce a standard or an order or a nondiscretionary agency duty "*and*" to impose civil penalties. The clear jurisdictional predicate is "enforce" and civil penalties are added on by "and" to cover cases in which subject matter jurisdiction has attached, enforcement is called for and in which penalties may be added.[6]

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5. Please compare the Fourth Circuit's treatment of the statutory language in concluding that it is ambiguous. It cited *Student Public Interest Research Group v. Monsanto* [600 F. Supp. 1474, 1476 (D.N.J. 1985)] for the proposition that "a *plausible* construction of the language is that one is 'in violation' and continues to be 'in violation' by having 'violated'." (791 F.2d, at 309; Petition Appendix A, at 9a) (emphasis supplied). In rejecting clarity it reached for a plausible meaning, *i.e.*, "a meaning superficially fair, reasonable, or valuable but often specious." (*Webster's Unabridged Dictionary*, 2d Ed. 1980).

6. *Amici* suggest plain meanings of words. Webster's defines "to enforce" as "to compel observance of; as to enforce the laws."

If Congress had intended penalties to apply to wholly past activities it could easily have drafted with respect to the first part of Section 505: "is, was or has been in violation" or like language. Similarly, with respect to the second part of Section 505 it could easily have drafted: "or to impose civil penalties", or, "or to impose civil penalties or both", or like language. It did not so draft in either place.

Unlike the Fifth Circuit, however, the Fourth Circuit not only strained the clear language and grammar of the statute as drafted (*compare*, *Hamker*, 756 F. 2d, at 392) but reached for merely plausible meanings of the words in the process and so found unclarity where clarity exists.

2. It went further. In a series of presumptions and inverted logic it legislated its own jurisdiction over citizen suits for wholly past violations.

(a) "A significant deterrent would be lost if citizen suits seeking civil penalties for past violations were not permitted." [791 F. 2d, at 309-310]. The statement begs the issue. In a right case penalties may be applied but the issue is whether such penalties apply where compliance has been achieved.[7]

(b) "While it cannot be denied that citizens' enforcement authority is narrower than that of government — citizens, for example, obviously cannot seek criminal

(*Footnote continued*)

[*Webster's Unabridged Dictionary*, 2d Ed. 1980]. Black's defines "enforce" as: "to put into execution; to cause to take effect; to make effective; as, to enforce a particular law . . .; to compel obedience to." [Black's Law Dictionary, 5th Ed. (1979)].

Clearly, if one is observing and obeying the laws they need not be enforced as against him.

7. As petitioner has artfully stated, this is not a case of an operator with a "continuous" sporadic or intermittent exceedence, or one who has turned off his spigot (*cf.*, *Hamker*, 756 F. 2d, at 399, *concurring op.*), but the case of an operator who has accomplished complete compliance by the application of diligence and technical expertise. *Amici* are informed that the plant has been operating 30 months now without a non-act of God exceedence.

penalties or issue compliance orders — the Act does not deprive citizens of the right to sue for past violations." [791 F. 2d, at 310].

Again the distinction between penalties in a right case and one where compliance has been achieved was ignored and the issue begged. The question is not whether the Act *deprives* citizens of a presumed right to sue for wholly past violations but whether the Act *grants* citizens that right.

The distinction is highlighted by a case such as this where the enforcement agency affirmatively adjudged that no enforcement action was either necessary or desirable — as a deterrent or for any other reason — precisely because technology for compliance was in place and adequate to the task, which would leave no standard or limitation violated, no order violated and no non-discretionary agency duty violated.

(c) Acknowledging the distinction between the threshold issue of jurisdiction and that of remedy, the court below completed its legislative task by inverting the concepts. The Fourth Circuit said:

> Gwaltney criticizes the logic of these [district court] opinions, arguing that they confuse the threshold issue of jurisdiction with the issue of penalties available once jurisdiction attaches and liability is found. Gwaltney contends that although the Act does provide for civil penalties, and even for penalties based on past violations, no relief whatsoever is available unless there is an ongoing violation on which to ground jurisdiction under section 505(a).
>
> There is some merit to this argument, because technically the issues of jurisdiction and penalties are analytically distinct. However, the Act's provision for civil penalties in citizen suits cannot be *totally ignored*. When read in conjunction with the Act's overall structure and its

> legislative history, it suggests strongly that citizens *should be* allowed to seek civil penalties for past violations even in the absence of an ongoing violation. (791 F.2d., at 310 n. 11) (emphasis supplied)[8]

The court reasoned that because penalties exist *if* jurisdiction attaches, *therefore* jurisdiction attaches.[9]

The wisdom of this Court is needed to review and ultimately reverse such logic.

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8. As *amici* understand Gwaltney's contentions in this regard, Gwaltney acknowledged that penalties might be proper for past violations in a case where violations are ongoing, requiring enforcement of a standard or an order or a non-discretionary agency duty. That is not the case here as the State of Virginia adjudged and the physical facts of the last 30 months have proven.

9. *Amici* note the Fourth Circuit's discussion of Section 505(a)'s use of the phrase "alleged to be in violation." (791 F.2d, at 308 n.9). While the Fourth Circuit decided that it need not reach the question whether "alleged" created only the requirement of a good faith pleading to vest a court with subject matter jurisdiction, it discussed the matter at length.

It noted that the district court had looked to the analogy of the sufficiency of a good faith pleading of the amount-in-controversy in diversity jurisdiction cases.

To the extent that this Court is distracted by this argument, *amici* would point out that it is no more than another example of the lower court's hyper-attention to the existence of the penalty provision, as distinct from a proper attention to the question of jurisdiction. If diversity jurisdiction is to provide any parallel it is the diversity aspect which should be looked to.

It may be that if the parties' citizenship is diverse, a failure to plead the right amount will not oust the court of jurisdiction, but if the allegations are of diversity and it develops that no diversity exists, the federal courts will not have jurisdiction of the case no matter what degree of good faith has gone into the pleading of diversity.

Here, in parallel, if a plaintiff alleges in good faith that an operator is in violation and in good faith requests penalties, and if it develops only that penalties are not awarded, the court would not be ousted of jurisdiction assuming enforcement was necessary because the operator was not in compliance. But if the same allegations are made and the facts are that the defendant is in compliance, subject matter jurisdiction does not lie.

D. In their statement of the issue at i, *supra*, *amici* asked whether Congress intended to empower citizens to punish plant operators who had achieved compliance by the application of diligence and state-of-the-art technology.

To support their suggestion that punishment *per se* as well as the desire to profit financially are significant motivations underlying at least some of these cases, *amici*, as *amici curiae*, share with the Court salient portions of a recent memorandum of a group considering becoming plaintiffs in new cases:

> "Polluters found liable are assessed penalties. (In the only case which wasn't settled, the court assessed a $1.28 Million penalty against a company on Chesapeake Bay.) These citizen suit provisions could be utilized by NYPIRG [New York Public Interest Research Group, Inc.] to punish polluters, gain publicity, steer a significant amount of money to worthwhile environmental projects, and conceivably, to bring money to NYPIRG in the form of legal fees to attorneys and scientific 'experts.'
>
> * * *
>
> [A plaintiff's environmental] law firm has brought approximately 26 suits under the Clean Water Act against 'direct dischargers' in New York and New Jersey (in fact, NJPIRG claims that the suits they file will provide a significant source of income for them) (*sic*), Friends of the Earth and Atlantic States Legal Foundation in New York."[10-11]

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10. NJPIRG is an acronym for New Jersey Public Interest Research Group a/k/a Student Public Interest Research Group.

11. *Cf.*, *Atlantic States Legal Foundation* v. *Al Tech Specialty Steel Corp.*, 635 F. Supp. 284 (N.D.N.Y. 1986); *Friends of the Earth* v. *Archer Daniels Midland Co.*, No. 84 Civ. 413 (N.D.N.Y. 1986); *Friends of the Earth* v. *Consolidated Rail Corp.*, 768 F.2d 57 (Cir.

(Memorandum, Randall Weiner, Water Hangg and Alison Kelly to NYPIRG Executive Committee re Clean Water Act Citizen Suits, July 19, 1986).

Whatever be the rights of plaintiff groups in other situations,[12] *amici* suggest that the foregoing statements highlight the importance of review by this Court to determine whether the Act contemplates citizen actions, always purely punitive and at least sometimes prompted by the desire for personal profit, against plant operators who have already expended and applied all the time, money, diligence and expertise necessary to accomplish compliance, who in fact stand in obedience to the law, and who have attained all the environmental benefits of compliance.

E. Similarly, *amicus* Consumer Alert urges such review because of its concern that penalties superimposed on the expenditures, capital and otherwise, already incurred to accomplish compliance will ultimately be paid by consumers of food products in the form of higher prices.

(Footnote continued)

1985); *Friends of the Earth* v. *Facet Enterprises, Inc.*, 618 F. Supp. 532 (W.D.N.Y. 1984); *Student Public Interest Research Group* v. *AT&T Bell Laboratories*, 617 F. Supp. 1190 (D.N.J. 1985); *Student Public Interest Research Group* v. *Anchor Thread Co.*, 22 Env't. Rep. Cas. (BNA) 1150 (D.N.J. 1984); *Student Public Interest Research Group* v. *Georgia-Pacific Corp.*, 615 F. Supp. 1419 (D.N.J. 1985); *Student Public Interest Research Group* v. *Monsanto Co.*, 600 F. Supp. 1474 (D.N.J. 1985); *Student Public Interest Research Group* v. *National Starch and Chemical Corp.*, 23 Env't. Rep. Cas. (BNA) 1982 (D.N.J. 1985); *Student Public Interest Research Group* v. *P.D. Oil & Chemical Storage, Inc.*, 627 F. Supp. 1074 (D.N.J. 1986).

12. The case does not present the question of the propriety or impropriety of penalties in suits where compliance has not been achieved and *amici* do not address that issue.

Cases such as the one at bar are wholly punitive as distinct from remedial and the defendant stands before the court not as a polluter but as an operator compliant with his environmental duties.

Consumers will be obligated to pay through higher prices the costs of attaining compliance. The addition of substantial civil penalties in punishment of a compliance achiever would operate as punishment of the consuming public without environmental benefit.

Amici suggest that such unfair results are unlikely to have been intended by Congress.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to grant the petition and issue a writ of *certiorari*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Richard B. McGlynn, Counsel of Record for *amici curiae* Mid-Atlantic Legal Foundation, *et al.*, certify that on the 24th day of November, 1986, I caused to be served three (3) copies of the attached motion and brief on the following:

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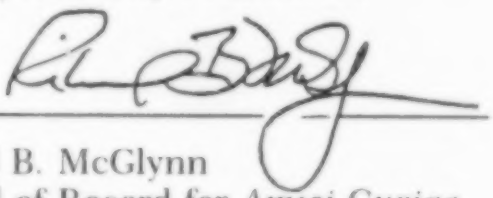

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